IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 352 OF 2020

BETWEEN

GZ TANZANIA INVESTMENT LIMITED.....APPLICANT

AND

TWAHILI MBENA & 16 OTHERS..... ..... RESPONDENT

JUDGMENT

Date of last order: 17/1/2022
Date of Judgment: 8/3/2022

B.E.K.Mganga, J

On divers' dates between March 2018 and September 2018, applicant employed the respondents in different capacities. On 30th September 2018, applicant terminated employment of the respondents based on operational requirements. Respondents were dissatisfied with termination of their employment as a result, they filed labour dispute No. CMA/DSM/TEM/596/2018/228/2018. On 9th January 2020, Hon. Amos. H, arbitrator, having heard evidence of the parties issued an award to the effect that there was valid reason for retrenchment but that the procedure was not followed. The arbitrator, therefore, issued

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an award in favour of the respondents and ordered the applicant to pay a total of TZS 30,000,000/= to all respondents.

Applicant was aggrieved by the said award hence this application for revision. In the affidavit sworn by Bo Tallmark Ojukwu, the Public Relation Manager and Principal Officer of the applicant, advanced six (6) issues to be determined by this court namely:-

1. *Whether it was proper for the CMA to hold that respondent's termination was procedurally unfair.*
2. *That the arbitrator established his own facts that termination of the respondents was effected on 03/10/2018 contrary to what was testified Twahili Mbena on his behalf and behalf of other that they only worked for five months only.*
3. *That commission's award is improperly procured by not considering that only one person gave his testimony during the hearing proceedings while the award reflected 16 more people who never gave their testimony.*
4. *That the commission's award is improperly procured by not considering that the respondents did not substantiate the claims that there was no consultation meeting which was conducted as required by the rules of evidence. It is further stated that the commission assumed that there was no consultation meeting conducted on 28/09/2020 and not considering the testimony of Silvester Augustino that the first consultation was conducted on 22/09/2019*
5. *That the commission's award is improperly procured by not considering that the respondents are not qualified to enjoy the benefits of the Employment and Labour Relation Act on the grounds that they only worked for five months as per their testimony.*

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6. Arbitrator erred in law and fact by failing to consider the circumstance of the respondents' termination from employment.

The application was resisted by the respondents through an affidavit affirmed by Twahili Mbena on behalf of all respondents.

When the application came for hearing on 23rd November 2021, Mr. William Evance Mwankusye, Advocate appeared for the applicant while Mr. Twahili Mbena appeared on behalf of the respondents. Both Mr. Mwankusye and Mbena informed the court that they were ready. I therefore allowed Mr. Mwankusye counsel for the applicant to make submissions. At the conclusion of submissions by counsel for the applicant, I asked Mr. Mbena on behalf of the respondent to make a reply submission thereof. It was at this time, Mr. Mbena informed the court that he needs a professional person to make submissions on behalf of the respondents as he is a lay person. In order to allow the respondents chance to argue well their case, I agreed with submissions of counsel for the applicant, who prayed, for interest of justice, the application to be argued by way of written submissions. I therefore, expunged oral submissions made by counsel for the applicant and ordered the application to be argued by way of written submissions.

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In the written submissions, Mr. William Evance Mwankusye, advocate for the applicant argued grounds 1 and 4 together and submitted that the procedure for termination based on operational requirement as provided under section 38(2) of the Employment and Labour Relations Act [Cap. 366 R. E 2019] was complied with. Counsel for the applicant submitted that on 21st September 2018, applicant issued a notice to the public and the respondents that she was facing economic hardship. Counsel submitted that consultation meeting was held on 22nd September 2018. He submitted further that, in the said meeting, reasons for the intended retrenchment, timing of retrenchment, ways to avoid retrenchment and benefits of the respondents were discussed. That, on 27th September 2018 another notice was issued for consultation meeting that was held on 28th September 2018 that finalized retrenchment process, as a result, respondents agreed and signed retrenchment documents and packages and later on received retrenchment packages. Counsel cited the case ***Resolution Insurance Ltd v. Emmanuel Shio & 8 Others, Labour Revision No. 642 of 2019,*** wherein this Court, Aboud J, held that the moment respondents were given a notice for retrenchment and consultation concluded, if they were dissatisfied, they ought to have

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knocked the CMA doors for mediation before signing the retrenchment package as they did, as required by the law.

In arguing grounds 2 and 5, counsel for the applicant submitted that, arbitrator erred to hold that there was no consultation while the only witness for the respondent (PW1) testified that he attended consultation meeting and tendered exhibit D5.

Submissions made on behalf of the applicant were strongly countered by Mr. Frank Sarwat, a representative from TUICO Ilala, a trade Union for and on behalf of the respondents. In his submission, Mr. Sarwat, submitted that applicant did not comply with retrenchment procedures as provided for under section 38(1) of the Employment and Labour Relations Act(supra) as no consultation was done. Mr. Sarwat submitted further that, though notice was issued on 21st September 2018 and 27th September 2018, no consultation meeting was held as there is no minutes signed by the respondents. He submitted that the purpose of consultation is to ensure that employer and the affected employees agree on the alternative ways to minimize the intended retrenchment such as transfer to another job, voluntary retrenchment package etc. Mr. Sarwat conceded that, in their testimony, respondents testified that they received packages of payment, but they did not know

what they were paid for. It was submitted on behalf of the respondent further that a trade union or any representative on the side of the respondents were not invited and that there was no formal meeting between the applicant and the respondents. Mr. Sarwat cited the case of ***Singita Grumet Reserves Ltd Pius Edward Burito, Labour Revision No. 31 of 2012*** and ***Janeth Mshiu v. Precision Air Service Limited, Labour Revision No. 5888 of 2018*** to stress that, a representative from a trade union was supposed to be invited to the said consultation meeting.

In rejoinder, counsel for the applicant submitted that if respondents were not satisfied with retrenchment process, they were supposed to abide by the provisions of section 38(2) of the Employment and Labour Relations Act (supra).

I should point that grounds 3 and 6 were not argued by counsel for the applicant and the personal representative of the respondents. I therefore take it that applicant abandoned them. I will therefore not consider them in this judgment.

It is undisputed that on 1st March 2018 all respondents entered into a one-year fixed term contract of employment with the applicant.

The said fixed term contract was expiring on 28th February 2019. It is also undisputed that employment contracts of the respondents were terminated 30th September 2018 having worked for seven months. In CMA F1, respondents indicated that applicant terminated their employment without paying them salary for the remaining period of their contracts and that they were not consulted.

The reasons advanced by the applicant for the said termination is economic hardship. Evidence of both Sylvester Augustino (DW1) and Skola Mmanda (DW2), who testified on behalf of the applicant is clear on this issue that applicant was experiencing economic difficulty. Incidentally, both DW1 and DW2 are ex-employees of the applicant. These two witnesses were retrenched together with the respondents. In their evidence, they testified that there was consultation and that all employees agreed and accepted to take retrenchment package. Evidence of these witnesses were not contradicted by evidence of the respondents or shaken during cross examination. Even Twahili Mbena (PW1) admitted in his evidence that, they were given two notices on 21st September 2018 and 27th September 2018 for the meetings that were held on 22nd September 2018 and 28th September 2018. In his evidence, PW1 testified that no agreement was reached on 28th September 2018,

but admitted while in cross examination to have been paid retrenchment package. Personal representative of the respondents seems not to challenge reasons for termination. I therefore, reach a similar conclusion with the arbitrator, that there was valid reason for termination.

Though arbitrator found that there was valid reason for termination of respondents' contracts, he found that there was no consultation as no minutes of the meeting were tendered during hearing. Due to absence of minutes, the arbitrator concluded that there was no consultation. The personal representative of the respondents echoed also that there was no consultation as there was no minutes tendered. Counsel for applicant submitted that procedures for retrenchment were adhered to, including consultation. I have revisited both section 38 of the Employment and Labour Relations Act [Cap 366 R.E.2019] and Rule 23 of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and find that, there is no requirement of tendering minutes of meeting in order to prove that consultation was done. In my view, so longer as that is not a requirement of law, the court has to rely on other evidence available namely; oral evidence by the parties. Both DW1 and DW2 on behalf of the applicant that consultation was done and there is no evidence to

contradict their evidence. There is no good reason assigned by the arbitrator for not believing what these two witnesses testified. The arbitrator believed these two witnesses on the reason for termination of contracts of the respondents and disbelieve them on the aspect of consultation. In disbelieving DW1 and DW2 on the issue of consultation, arbitrator was supposed to give reasons but none is on record. PW1 who testified for the respondent appears to concede that there was consultation, but that they were not given enough time. PW1 in his evidence testified that there was no agreement. The issue is whether under the circumstances of the case at hand, respondents were given enough time or not. In terms of Rule 23(7)the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007, the period for consultation can be shortened especially when there is urgency. Looking on the evidence on record, especially evidence of DW2, in my view, respondents were given enough time in the circumstances of the case. In fact, DW2 while under cross examination testified:-

> *"...Mwisho wa siku kulikuwa hakuna namna, wao wenyewe walikuwa hawana jinsi kiwanda kinaondolewa nchini. Ilifika mahala hakuna kinachoweza kufanyika kwani biashara haikuwepo..."*

That evidence was not contradicted by any other evidence. I therefore hold that respondents were consulted properly, which is why,

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they accepted retrenchment packages. If at all they were not satisfied, they were supposed to refer the matter to CMA in terms of section 38(2) of Cap.366 R. E 2019 (supra) before taking retrenchment packages. The issue of being not given enough time could have been one of their complaint at CMA before taking retrenchment package. I therefore associate myself with the holding of my learned sister, Aboud, J, in ***Resolution Insurance Ltd,*** (supra). It was open to the respondents to take the dispute to CMA at that time and not thereafter. In other words, it is my view, respondents took the dispute to CMA as an afterthought. That cannot be allowed.

It was argued by the respondents that their representatives from a trade union were not invited and cited ***Singita Grumet's case*** (supra) and ***Janeth Mshiu's case*** (supra). In my view, this complaint lacks merit. It was testified by DW1 under cross examination as follows:-

"...Tulijiandaa lakini alitupa option nyingine ya kuleta mwakilishi wetu toka chama cha wafanyakazi au mtu anayefaa, mpaka kikao cha pili hakikupata mwakilishi."

The quoted part of evidence of DW1 says all. In no way, applicant could have forced respondents to bring their representative from a trade union. In my view, the holding in ***Singita Grumet's case*** (supra) and

Janeth Mshiu's case (supra) can not apply in the circumstances of this case.

For all said hereinabove, I allow the application, quash and set aside the CMA award.

Dated at Dar es Salaam this 8th March 2022.

B.E.K. Mganga
JUDGE

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